No. 89-1701

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD MASTERS,

Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
1. WHETHER KANSAS WOULD RECOGNIZE A CAUSE OF ACTION FOR RETALIATORY DISCHARGE IS NOT BEFORE THIS COURT, AND THUS IS NOT A REASON TO DENY CERTIORARI.....	1
CONCLUSION.....	16

TABLE OF AUTHORITIES

Page

Chrisman v. Philips Indus., 242 Kan. 772, 751 P.2d 140 (1988)..... 7, 11

Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988).....4, 5, 6, 13

Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 645 (1986)..... 4, 13

English v. General Electric Co., --- U.S. --- (Case No. 89-152, 6/4/90)..... 12

Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988)..... 3, 13

Pilcher v. Board of Wyandotte County Comm'rs, 14 Kan.App.2d 206, --- P.2d --- (1990)..... 9, 10

Polson v. Davis, 895 F.2d 705 (10th Cir. 1990).....8, 9, 10

Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514, 1517-19 (C.D. Cal. 1986)..... 12

STATE STATUTES

K.S.A. 44-1001 et seq..... 9

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1. WHETHER KANSAS WOULD RECOGNIZE A CAUSE OF ACTION FOR RETALIATORY DISCHARGE IS NOT BEFORE THIS COURT, AND THUS IS NOT A REASON TO DENY CERTIORARI.

While Petitioner disagrees with many statements made in "Respondent's Brief In Opposition To The Petition For Writ Of

Certiorari," Petitioner will adhere to rules permitting a reply brief only to issues first raised in the brief in opposition.

Respondent suggests this Court should not grant certiorari because Kansas would not recognize a claim for petitioner's retaliatory discharge. That argument assumes the outcome of a question appealed to but not decided by the Tenth Circuit. Respondent acknowledges that "[b]ecause of its holding on the pre-emption issue, the Tenth Circuit did not reach the question of whether Masters had stated a valid claim for retaliatory discharge...." (Respondent's Brief at p. 3). Accordingly, the question of whether Kansas would recognize Ron Masters' cause of action for retaliatory discharge is not a question before this Court.

If certiorari is granted and the Tenth Circuit is reversed on the issue of

federal preemption, then this Court would undoubtedly remand for determination by the Tenth Circuit (or by the Kansas Supreme Court on certification of a question of law) of the state law question.

Nevertheless, since Respondent has argued the issue, if the Court considers the issue important then Petitioner responds as follows.

Kansas has recognized the tort of retaliatory discharge. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988). Respondent contends that if a discharged employee had another remedy, then Kansas would not recognize a cause of action for retaliatory discharge. We will herein refer to this as the "other available remedy" exception.

Despite several opportunities, Kansas appellate courts have never adopted the "other available remedy" exception to the

tort of retaliatory discharge. Moreover, the Kansas Supreme Court itself appears indecisive in drawing the parameters of the tort. See Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988), overruling Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 645 (1986). Cox had reasoned that because a collective bargaining agreement provided a grievance procedure, which included binding arbitration (i.e. an "other available remedy"), employees covered by such agreements could not avail themselves of the state tort of retaliatory discharge. Less than two years later, the Kansas Supreme Court in Coleman rejected that reasoning and overruled Cox.

Coleman could have adopted the "other available remedy" exception but did not. Coleman discussed the inadequacy of arbitral procedures, specifically their inappropriateness for the resolution of

tort claims. The court discussed the significance of a retaliatory discharge case where the focus is on the employer's motive for the firing and the impact upon the employer-employee relationship, not the industrial unionized concerns. Coleman stated that the "grievance and arbitration procedure is an inappropriate forum for the enforcement of state public policy...." Id., 242 Kan. at 813, 752 P.2d at 651, and held that arbitral procedures, while well suited to the resolution of contractual disputes, are comparatively inappropriate for the resolution of state tort claims. Although Coleman had an available arbitration process and appeal procedure, the court found that the remedy was inadequate and that the availability of another remedy did not bar the state tort action.

So too here, in light of Coleman it is highly unlikely the Kansas Supreme

Court would adopt the "other available remedy" exception. If the arbitral procedures in Coleman were inappropriate for enforcement of public policy, the administrative procedure in § 210 is likewise inappropriate. Coleman grouped cases of retaliatory discharge into three classes: (1) cases in which employees are discharged for refusing to violate criminal statutes; (2) cases in which employees are discharged for exercising a statutory right; and (3) cases in which employees are discharged for complying with a statutory duty. All three classes apply here. Further, the remedy under § 210 is certainly limited and highly inadequate in light of the extraordinarily short 30-day statute of limitations and the unavailability of punitive damages. Instead of § 210 acting to vindicate employee claims as intended by Congress, it is being used as a sword by employers

to defeat meritorious state law claims; employers are twisting the "employee protection" of § 210 into employer protection.

In Chrisman v. Philips Indus., 242 Kan. 772, 751 P.2d 140 (1988), the Kansas Supreme Court had another opportunity to embrace the "other available remedy" exception, but the case was decided on the basis of § 210 federal preemption instead.

Adoption of the "other available remedy" exception in Kansas would mean that any time a federal statute permits an administrative procedure, then Kansas must refuse to provide redress to its citizen. Why would any properly informed state court of last resort, which has recognized the tort of retaliatory discharge to protect important aspects of public policy, choose to voluntarily withdraw jurisdiction from state courts and instead yield complete control over all such cases

to a federal administrative procedure? Adoption of the "other available remedy" exception is completely at odds with the assertion and protection of the sovereignty of the states which is the very essence of federalism.

Moreover, withdrawing the tort of retaliatory discharge from state courts and supplanting it with a federal administrative procedure creates the state and federal constitutional issues already previously raised herein: separation of powers, jury trial, and due process (quid pro quo). The Kansas Supreme Court has never been presented with or decided any of the above arguments.

Respondent cites Polson v. Davis, 895 F.2d 705 (10th Cir. 1990), as support for its argument that Kansas would adopt the "other available remedy" exception to the tort of retaliatory discharge. Maureen Polson was an employment supervisor

employed by the City of Kansas City, Kansas, who alleged her employment was terminated in retaliation for her objections to the City's discriminatory hiring practices. Polson held that plaintiff's remedies under Kansas statutory law (Kansas Acts Against Discrimination, K.S.A. 44-1001 et seq, [KAAD]) preclude recovery under the tort of wrongful discharge. The result in Polson is contrary to the result in Pilcher v. Board of Wyandotte County Comm'rs, 14 Kan.App.2d 206, --- P.2d --- (1990), wherein the Kansas Court of Appeals recognized a cause of action for retaliatory discharge in favor of a county case worker who alleged employment termination because her superiors believed she was the source of an article in the Kansas City Times which was highly critical of the county's hiring practices. No mention was made of KAAD in Pilcher.

One would think that if KAAD was plaintiff's exclusive remedy as held by the Tenth Circuit in Polson, then the Kansas Court of Appeals would have at least mentioned it in Pilcher.

Further, the court in Polson recognized the differences of opinion among Kansas United States District Court Judges Theis, O'Connor, and Rogers on this issue. (895 F.2d at 709). The Court also said the issue is "clouded" by Kansas Supreme Court cases. Id.

Accordingly, it appears only Kansas federal courts, not Kansas state courts, have employed the "other available remedy" exception to dismiss cases of retaliatory discharge.

After arguing that Kansas would adopt the "other available remedy" exception, at least where that remedy is adequate, Respondent then states the Kansas Supreme

Court has already "ruled" on the adequacy of a § 210 remedy in Chrisman v. Philips Industries, Inc., 242 Kan. 772, 751 P.2d 140 (1988). Yet respondent acknowledges the Kansas Supreme Court held:

> "We need not determine whether termination of an employee for 'whistleblowing' in nuclear and related industries violates state public policy or whether further exception to the employment-at-will doctrine should be created. Congress has provided the exception by legislation, which we hold preempts the field."

Id., 242 Kan. at 780, 751 P.2d at 145. The gratuitous statement in Chrisman that § 210 provides a substantial and effective remedy is pure dicta. The adequacy of a § 210 remedy was not at issue in Chrisman and there is no indication such was necessary or essential to determination of the question of federal preemption.

As the question of whether § 210 preempts state law claims is a matter of

federal law [Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514, 1517-19 (C.D.Cal. 1986)], and as this Court has now ruled in English v. General Electric Co., --- U.S. --- (Case No. 89-152, 6/4/90), that § 210 does not preempt state law claims, Kansas is now free to provide its citizens with redress in its courts. When this Court reverses and remands the case at bar back to the Tenth Circuit based on English, then the Tenth Circuit (or, more appropriately, the Kansas Supreme Court on certification of a question of law) will have to determine whether to allow an action for retaliatory discharge under the facts herein and in view of the arguments made in this case.

Respondent at p. 8 of its Brief claims "nothing has called into question the District Court's opinion that Masters failed to state a claim for retaliatory

discharge in violation of public policy under Kansas law." The appeal to the Tenth Circuit in this case calls that opinion into question. Also, the District Court below relied heavily on Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 645 (1986), but Cox was then reversed by the Kansas Supreme Court in Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988). And the Kansas Supreme Court first recognized the cause of action for retaliatory discharge in Palmer v. Brown, supra, decided one month after the District Court's decision below. This Court cannot assume Kansas would not recognize Petitioner's claim for retaliatory discharge and deny certiorari on that basis.

At p. 4 of its Brief, Respondent asserts that "...Masters abandoned his claim for intentional infliction of emotional distress...." This is not true;

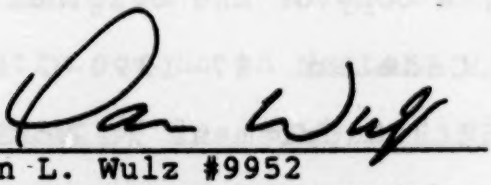
in fact, leave to amend to assert intentional infliction of emotional distress was recently sought in Masters v. Kansas Gas & Electric Co. and Daniel International Corp. et al., D.C.Kan. Case No. 87-1290-C, based upon a recent diagnosis of post-traumatic stress disorder resulting from Petitioner's mistreatment by Respondent and others. As indicated in footnote no. 4 to the Petition For Writ Of Certiorari herein at pp. 30-31, since the instant case was dismissed for failure to state a claim, was dismissed without prejudice, and with leave to proceed on the complaint filed in Case No. 87-1290-C, Masters has done so. [See the district court's Memorandum and Order below, Masters v. Daniel International Corp., Case No. 86-4268-R (Memorandum and Order, 2/25/88, unpublished, Rogers, J.), Appendix To

Petition For Writ Of Certiorari at App. 33; a copy of the original Complaint filed in Case No. 87-1290-C is attached to "Fifth Supplement To Motion To Alter Or Amend, Doc. #54, 9/16/87]. Petitioner has not "abandoned" any claims, and the appeal in the instant case was taken only out of an abundance of caution. If the federal preemption ruling herein be reversed, we expect remand for trial with D.C.Kan. Case No. 87-1290-C of all claims.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted,



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